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IN THE

Supreme Court of the United States

October Term, 1966

No. 741

STRACHAN SHIPPING COMPANY,

Petitioner,

—against—

ROYAL NETHERLANDS STEAMSHIP COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Opinion Below, Jurisdiction, and Rule Involved

The official report of the opinion below, the jurisdictional requisites, and the portions of F. R. Civ. P. 49(a) involved are adequately set forth on pages 1 and 2 of the petition.

Questions Presented

1. Is ultimate determination of whether the stevedore breached its warranty of workmanlike service to the shipowner, or of whether the shipowner is precluded from recovering indemnity from the stevedore, a finding of fact or a conclusion of law?

2. Does failure by the shipowner to halt the stevedore's operations in order to repair a reportedly defective winch raise a factual question of whether the shipowner is precluded from recovering indemnity for the stevedore's breach of warranty of workmanlike service, particularly if the jury finds that the stevedore's continued operation of the winch was not a contributing cause of the accident?

3. Where the trial court denied the stevedore's request to submit interrogatories to the jury on the ultimate questions of whether the stevedore breached its warranty of workmanlike service and of whether the shipowner was precluded from recovering indemnity and, after stating that the special verdict in favor of the shipowner left him "in a state of confusion and doubt", the trial judge directed entry of judgment for the stevedore, does F. R. Civ. P. 49(a) create an irrefutable presumption that the judgment was entered on the verdict and that the trial court implicitly found that the stevedore did not breach its warranty and that the shipowner was precluded from recovering indemnity?

Statement

The essential facts are set forth on pages 3-7 of Royal Netherlands Steamship Company's pending petition for certiorari in No. 729 and all record references are to pages of the record filed in that case.

The only additional evidence in the record which pertains in any manner to Strachan Shipping Company's petition in this case No. 741 is testimony by the injured longshoreman that previous difficulty with the winches caused several loads of pipe to jerk (R. 11-12); testimony by one of the winchmen and by the gang boss that another winchman mentioned that he told a mate about some unspecified

winch trouble (R. 26-28); testimony by the other winchman that both before and at the time of the accident his winch "ran away" (R. 36-37); and testimony by a ship's officer that if the mate on deck observed anything seriously wrong with the operating condition of a winch, he should notify his superior and the stevedore foreman, halt the cargo operation, and get the ship's engineer to repair the winch (R. 29-32).

The trial court denied Strachan's requests to charge that the shipowner, Royal, had the burden of proving that its own conduct precluded it from recovering indemnity from the stevedore, Strachan, (R. 98) and that Royal could be denied indemnity if Royal failed to halt Strachan's operations so that Royal could repair a winch which Strachan had reported to be defective (R. 95, 99). The trial court also refused Strachan's requests to submit special interrogatories to the jury on the ultimate questions of whether Strachan breached its warranty of workmanlike service to Royal (R. 102) and of whether Royal was precluded from recovering indemnity for Strachan's breach of warranty (R. 103).

Argument

Strachan's petition assumes, erroneously, that ultimate determination of whether Strachan breached its warranty and of whether Royal was precluded from recovering indemnity are factual findings; that Royal's failure to halt Strachan's operations so as to repair the reportedly defective winch could preclude Royal from recovering indemnity; and that by operation of F. R. Civ. P. 49(a), the trial court found that Strachan did not breach its warranty and that Royal was precluded from recovering indemnity.

I. Ultimate determination of whether a stevedore's conduct amounts to a breach of its warranty of workmanlike service "is a naked conclusion of law". *Halliburton Co.* v. *Norton Drilling Co.*, 302 F. 2d 431, 435 (5 Cir. 1962), rehear. denied 313 F. 2d 380, cert. denied 374 U. S. 829. Thus, in *Drago* v. *A/S Inger*, 305 F. 2d 139, 142 (2 Cir. 1962), cert. denied 371 U. S. 925, the "conclusion that the conduct of the stevedoring company * * * fell short of that 'workmanlike service' that it warranted to the shipowner" was based upon "findings as to the underlying evidentiary facts relevant to the indemnity claim".

Here, the trial court properly submitted to the jury under F. R. Civ. P. 49(a) questions which required categorical findings of disputed evidentiary facts (R. 177-180) upon which the court could and should have concluded as a matter of law that Strachan breached its warranty of workmanlike service to Royal. Since the jury cannot decide questions of law, such questions should not be put to the jury under F. R. Civ. P. 49(a), *Theodorf* v. *Lipsey*, 237 F. 2d 190, 193 (7 Cir. 1956); *Ratigan* v. *New York Central Railroad Co.*, 291 F. 2d 548, 554 (2 Cir. 1961), cert. denied 368 U. S. 891. Hence, the trial court properly denied Strachan's request to submit to the jury the ultimate legal question of whether Strachan breached its warranty of workmanlike service and the trial court cannot be deemed to have inferentially answered that question in favor of Strachan by operation of F. R. Civ. P. 49(a) since the question is not one of fact.

II. Ultimate determination of whether Royal's conduct precluded it from recovering indemnity is also a conclusion of law and was so treated in, among other cases cited in this brief, *Drago* v. *A/S Inger, supra*, 305 F. 2d, p. 143; *Ameri-*

can Export Lines, Inc. v. *Revel, infra,* 266 F. 2d, p. 87; *Misurella* v. *Isthmian Lines, Inc., infra,* 215 F. Supp., pp. 862-863, 328 F. 2d, pp. 41-42; and *Mortensen* v. *A/S Glittre, infra,* 348 F. 2d, pp. 384-385. Thus, the trial court properly denied Strachan's request to submit this ultimate legal question to the jury and cannot be deemed to have inferentially answered that question in favor of Strachan by operation of F. R. Civ. P. 49(a).

Furthermore, even if the jury's answers to special interrogatories Nos. 3, 4, and 11 (R. 178, 180) had not eliminated continued operation of the defective winch as a causal factor, any failure by Royal to halt Strachan's operation of the winch in order to repair any reported defect could not, as a matter of law, preclude Royal from recovering indemnity from Strachan.

In *American Export Lines, Inc.* v. *Revel,* 266 F. 2d 82, 83, 87 (4 Cir. 1959), the court held that the fact that the ship's mate, to whom the stevedore reported a defective winch, not only did not stop the operation but actually instructed the longshoremen to continue running the winch "as best they could", did not constitute indemnity precluding conduct by the shipowner as a matter of law.

In *Misurella* v. *Isthmian Lines, Inc.,* 215 F. Supp. 857, 859, 863 (S. D. N. Y. 1963), aff'd 328 F. 2d 40, 41-42, the district court held and the circuit court affirmed that negligent failure by the ship's mate to correct an unsafe condition, although specifically and repeatedly requested to do so by the stevedore, did not bar recovery of indemnity by the shipowner as a matter of law. *Albanese* v. *N.V. Nederl. Amerik., etc.,* 346 F. 2d 481, 483-484 (2 Cir. 1965), stevedore's petition for certiorari denied 382 U. S. 283, is in accord, even though the mate induced the stevedore to con-

tinue its operations by promising that the defective condition would shortly be rectified.

In *Mortensen* v. *A/S Glittre,* 348 F. 2d 383, 385 (2 Cir. 1965), the court reaffirmed its conclusion that, to be precluded from indemnity, the shipowner's conduct "must at least prevent or seriously handicap the stevedore in his ability to do a workmanlike job" which, as pointed out in the *Misurella* and *Albanese* decisions, *supra,* cannot occur as a matter of law if, after notice of a defective condition, the stevedore fails to stop its own operations until the defect is corrected.

In *T. Smith & Son, Inc.* v. *Skibs A/S Hassel,* 362 F. 2d 745, 747 (5 Cir. 1966), after referring to "the general rule that negligence by the shipowner is not a bar to recovery" of indemnity, the court held that if "the stevedore has knowledge of a defect it should correct it or require it to be corrected by the ship's officers", failing which there is a "clear" breach of the stevedore's warranty of workmanlike service.

Misurella, supra, 215 F. Supp., p. 863, and *Pacific Far East Lines* v. *California Stevedore & Ballast Co.,* 238 F. Supp. 956, 959 (N. D. Cal. 1965), rejected as obsolete and contrary to the weight of more recent authority the opinions in *Hagans* v. *Farrell Lines,* 237 F. 2d 477 (3 Cir. 1956), and *Smith* v. *Pan-Atlantic Steamship Corp.,* 161 F. Supp. 422 (E. D. Pa. 1957), aff'd 254 F. 2d 600, cited in footnote 15, page 9, of Strachan's petition, and the other case there cited, *Hodgson* v. *Lloyd Brasileiro, etc.,* 294 F. 2d 32, 35 (3 Cir. 1961), cert. denied 369 U. S. 848, is not pertinent since it involved a stevedore which did stop its operations upon discovering that the winch was defective and did not

resume work until "after receiving a categorical assurance from the shipowner's crew that it was 'O. K.' " following repairs by the ship's engineer, whereupon "the accident happened either after the very first or second attempt" by the stevedore to use the supposedly repaired winch. Here, Strachan never stopped its operations after learning of the defect and none of the ship's crew ever assured Strachan that it would be "O. K." to continue using the winch.

The assertion that Royal's indemnity claim could be defeated because Royal did not halt Strachan's operations so that Royal could repair a reportedly defective winch is simply an attempt by Strachan to "use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense", which was rejected as a matter of law in *Ryan Stevedoring Co.* v. *Pan-Atlantic Corp.*, 350 U. S. 124, 134-135 (1956), and *Weyerhaeuser S.S. Co.* v. *Nacirema Co.*, 355 U. S. 563, 568 (1958).

III. Even if the ultimate questions of whether Strachan breached its warranty and of whether Royal's conduct precluded indemnity were factual, the trial court could not be deemed to have implicitly found those facts in Strachan's favor by operation of F. R. Civ. P. 49(a).

Since it was the trial court's function to propound legally sufficient interrogatories to the jury, *Atkinson* v. *Roth*, 297 F. 2d 570, 575 (3 Cir. 1961), the court presumably felt that the interrogatories which it submitted were all those needed to enable the jury to make findings upon every essential issue of fact. Yet, faced with a special verdict which plainly mandated a judgment for Royal, but which left the trial court "in a state of confusion and doubt" (R. 168), the court directed that judgment be entered in favor of Strachan.

Under F. R. Civ. P. 49(a), the trial court is deemed to have implicitly made findings of omitted issues of fact only if judgment is entered "on the special verdict". Strachan's petition concedes, as it must, that the jury's answers to the special interrogatories "were in no way relied on by the Trial Court in entering judgment for Strachan", page 6, and that the "judgment of the Trial Court below does not depend to the slightest extent on any of the answers of the jury", page 12.

This is necessarily so because the jury found (R. 177-180) that the sole contributing causes of the accident were numerous errors and omissions by Strachan in violation of "basic uniform safe practices" (R. 131), Strachan's own contract "General Safety Rules" (R. 118-119), and the failure of Strachan's employees "to be more careful" (R. 147-148) which quite apart from the finding that the injured Strachan longshoreman was contributorily negligent (R. 180), amounted, as a matter of law, to a flagrant breach of "the stevedore's obligation to perform with reasonable safety", *Italia Societa, etc.* v. *Oregon Stevedoring Co.*, 376 U. S. 315, 319 (1964). What the trial court did was to completely disregard the special verdict and, in effect, enter another summary judgment for Strachan, contrary to *Koninklyke Nederlandsche, etc.* v. *Strachan Shipping Co.*, 301 F. 2d 741 (5 Cir. 1962), rehear. denied 304 F. 2d 545, cert. denied 371 U. S. 921.

CONCLUSION

For the foregoing reasons it is respectfully submitted that Strachan's petition for a writ of certiorari should be denied.

Respectfully submitted,

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